Malaysia Travel Bureau Sdn Bhd v Melia Majilis

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–3689 OF 1998
KANG HWEE GEE J
16 JULY 2008

Civil Procedure — Judgments and orders — Judgment in default — Application to set aside — Extension of time — Undue delay in filing application — Whether defendant had merits in defence — Whether defendant managed to explain delay in filing application

The plaintiff's claim against the defendant was for a declaration to rescind the share sale agreement on grounds of non-disclosure of material facts and misrepresentation, fraud and undue influence. The plaintiff also claimed against the defendant a sum of RM68,929 which the plaintiff alleged as being the operational cost of Melia Travel Sdn Bhd after it had been taken over by the plaintiff. The learned judge however, had struck off the defence and entered judgment against the defendant for two reasons. Firstly, counsel for the defendant had not obtained the sanction of the official assignee to represent the defendant in this matter although a previous sanction was given to appoint the previous solicitor. Secondly, the newly appointed counsel had failed to comply with the case management direction. The defendant applied for an extension of time to file an application to set aside the judgment entered against them and further to reinstate their amended defence. This application was filed approximately one year and four months after the judgment was entered.

Held, dismissing the application with costs:

(1) The first reason may be a matter of contention as to whether a new sanction was required from the official assignee to appoint a new counsel given that the sanction envisaged in s 38(1)(a) of the Bankruptcy Act 1967 is 'to maintain any action' and logically therefore, the appointment of a new counsel to replace the former should not be required. It is not the function of this court to enquire into the propriety of the judgment. It is for the defendant to appeal (see para 4).

(2) The second reason relates to the exercise of discretion by the judge under O 34 r 7 whether to strike out the amended defence by reason of the non-compliance with case management under O 34 r 4. This is

a matter of the exercise of discretion to strike out the defendant's defence. Whether or not that discretion was rightfully exercised is not for this court to decide and reverse. It should rightfully be taken on appeal (see para 5).

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan untuk satu deklarasi untuk membatalkan perjanjian penjualan saham atas alasan ketakdedahan fakta penting dan salah nyata, fraud dan pengaruh tak wajar. Plaintif juga menuntut terhadap defendan sejumlah RM68,929 yang mana plaintif mendakwa berkenaan dengan kos operasi Merlia Travel Sdn Bhd selepas ianya diambil alih oleh plaintif. Tetapi, hakim yang bijaksana, telah menolak pembelaan dan memasukkan penghakiman terhadap defendan atas dua sebab. Pertama, peguamcara defendan tidak mendapatkan persetujuan pegawai pemegang harta untuk mewakili defendan dalam kes ini walaupun kebenaran lepas telah diberikan untuk melantik peguam yang lalu. Kedua, peguamcara yang baru dilantik telah gagal untuk mematuhi arahan pengurusan kes. Defendan telah memohon untuk lanjutan masa untuk memfailkan permohonan untuk mengenepikan penghakiman yang telah dimasukkan terhadap mereka dan seterusnya untuk mengembalikan pembelaan terpinda mereka. Permohonan ini telah difailkan sekurang-kurangnya satu tahun empat bulan selepas penghakiman dimasukkan.

Diputuskan, menolak permohonan dengan kos:

(1) Alasan pertama berkenaan dengan penegasan sama ada persetujuan baru diperlukan daripada pegawai pemegang harta untuk melantik peguamcara yang baru, yang mana persetujuan yang dinyatakan di dalam s 38(1) Akta Kebankrapan 1967 adalah 'untuk mengekalkan mana-mana tindakan' dan secara logiknya oleh itu perlantikan peguamcara yang baru untuk menggantikan yang lama seharusnya tidak diperlukan. Ianya bukan fungsi mahkamah ini untuk mengetahui kesesuaian penghakiman. Ianya adalah bagi defendan untuk merayu (lihat perenggan 4).

(2) Alasan kedua berkaitan dengan perlaksanaan budi bicara oleh hakim di bawah A 34 k 7 sama ada untuk menolak pembelaan terpinda dengan alasan ketakpatuhan sengan pengurusan kes di bawah A32 k 4. Ini adalah perkara perlaksanaan budi bicara untuk menolak pembelaan defendan. Sama ada budi bicara dilaksanakan dengan betul atau tidak

bukanlah bagi mahkamah ini untuk menentukan dan memansuhkannya. Ia seharusnya dibawa sebagai rayuan (lihat perenggan 5).]

Notes

For cases on judgment in default, see 2(1) *Mallal's Digest* (4th Ed 2007 Reissue) paras 4150–4157.

Legislation referred to

Bankruptcy Act 1967 s 38(1)(a)
Rules of the High Court 1980 O 34, O34 r 4, O 34 r 7

CS Mong (Nor Rifhan with him) (Lee Hishamuddin Allen & Gledhill) for the plaintiff.
Maznah Kamaruddin (Abdullah & Maznah) for the defendant.

Kang Hwee Gee J (This is my oral judgment (ex tempore):

[1] This is an application by the defendant to apply for an extension of time to file an application to set aside the judgment entered against the defendant and to reinstate the 'pernyataan pembelaan defendan terpinda' dated 5 October 1999 before Zainun Ali J (as she then was) on 17 June 2005.

[2] The judgment read as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

GUAMAN NO: D2-22-3689-1998

Antara

Malaysia Travel Bureau Sdn Bhd (Co. No. 423439-W) — Plaintif

Dan

Melia Majilis — Defendan

PADA 17 HARIBULAN JUN 2005 — DALAM KAMAR

PENGHAKIMAN

Menurut Perintah Mahkamah bertarikh 17 haribulan Jun 2005 yang memerintahkan bahawa Pernyataan Pembelaan Defendan Terpinda bertarikh 5 haribulan Oktober 1999 yang dipinda pada 17 haribulan Mei 2004 dibatalkan dan penghakiman dimasukkan memihak kepada Plaintif dalam terma-terma Pernyataan Tuntutan bertarikh 6 haribulan Oktober 1998.

ADALAH PADA HARI INI DIHAKIMKAN DAN DIISYTIHARKAN bahawa perjanjian bertarikh 1 haribulan Julai 1997 di antara Plaintif dan Defendan telah ditamatkan dan Plaintif tidak lagi terikat di bawah sebarang terma-terma perjanjian tersebut.

DAN ADALAH PADA HARI INI DIHAKIMKAN bahawa Plaintif dibenarkan untuk:

(1) membetulkan Daftar Ahlinya dengan membatalkan nama Defendan sebagai pemegang 2.5 Juta saham biasa dalam Plaintif yang dibayar dengan tunai sepenuhnya;

(2) membatalkan sijil-sijil saham di bawah nama Defendan sebagai pemegang 2.5 Juta saham biasa dalam Plaintif yang dibayar dengan tunai sepenuhnya;

(3) membetulkan pulangan yang difailkan dengan Pendaftar Syarikat yang menunjukkan bahawa Defendan adalah pemegang 2.5 Juta saham biasa dalam Plaintif yang dibayar dengan tunai sepenuhnya; dan

(4) memfailkan borang-borang dan pulangan yang perlu dengan Pendaftar Syarikat, dan membuat apa-apa tindakan atau perkara yang perlu bagi memberi kesan kepada perintah-perintah yang dibuat di dalam perenggan-perenggan 1 sehingga 3 di atas.

DAN ADALAH JUGA PADA HARI INI DIHAKIMKAN bahawa Defendan membayar kepada Plaintif:

(1) jumlah RM68,929.00;

(2) gantirugi untuk ditaksirkan;

(3) faedah pada 8% setahun atas jumlah RM68,929.00 dan atas sebarang jumlah yang ditaksirkan, dari 17 haribulan Jun 2005 sehingga tarikh pembayaran penuh; dan

(4) Kos-kos.

Bertarikh pada 17 haribulan Jun, 2005.

Sgd.

WAN FADHILAH NOR BT. WAN IDRIS

Timbalan Pendaftar

Mahkamah Tinggi Malaya

Kuala Lumpur

Puan Maznah Kamaruddin for the defendant (verbatim)

(1) The delay was due to the handling of the matter by the previous solicitor whereby the defendant before 17 June 2005 engaged a lawyer

to attend to the case management which is fixed on 17 June 2005. On that day Messrs Hamzah, Daud Daros & Siti Nor sent a lawyer by the name of Saiful Ambar representing the defendant. However, due to the defendant already bankrupt at that particular time, the lawyer representing the defendant has yet to get extension from the official assignee. At the same time the lawyer who is also newly appointed has not complied with the court's direction to file certain documents for the case management. Being unsatisfied with the delay the learned judge struck off the defence and entered judgment against the defendant. The defendant however was not informed of the judgment that was already entered against her until she herself at the material time in USA contacted her daughter to find out the outcome of her case. Subsequently Messrs Hamzah, Daud Daros & Siti Nor refused continuing handling the matter and she with her own initiative came back to Malaysia to get assistance from 'Biro Bantuan Guaman'. She has to go through the process to get the exception from the Minister to enable Biro Bantuan Guaman to represent her. On 21 March 2006 the Minister agreed to give exception to her and subsequent to that on 20 February 2006 Biro Bantuan Guaman filed an application in encl 59 which is fixed for hearing on 26 June 2006 but was withdrawn. After that Ketua Pengarah Biro Bantuan Guaman herself trying to get the panel lawyer of Biro Bantuan Guaman to handle the matter and I was appointed on 3 August 2006. Hence I acted to obtain sanction from the official assignee as the defendant was a bankrupt on 21 August 2006 and sanction was obtained on 20 October 2006. This application for leave encl 72 was filed on 12 October 2006. I had to get documents from the previous solicitor and Biro Bantuan Guaman before I can file this application.

(2) We have merits in our defence. The subject matter is a share sale agreement dated 1 July 1997. The plaintiff's claim against the defendant is for declaration to rescind the share sale agreement on grounds of non-disclosure of material facts and misrepresentation, fraud and undue influence. The defence is that they have complied with all the agreement and there was misrepresentation. The shares already transferred to the defendant. Due diligence was made by a common auditor appointed by the parties before the agreement was signed.

(3) On the issue of the sum of RM68,929 which the plaintiff alleged was owed by the defendant this amount constitutes the operational cost of Melia Travel Sdn Bhd after it had been taken over by the plaintiff.

(4) The notice of termination dated 7 November 1997 — the defendant states that this notice was issued out by the plaintiff without the mandate of the board of directors of the plaintiff.

(5) The issue of whether the company secretary of the plaintiff has unintentionally registered the relevant documents with ROC much earlier than they are directed to do so.

(6) The plaintiff also alleged that minutes of the meeting exhibited in the defendant's affidavit particularly referred to exhs 'ML-20', 'ML-21', 'ML-23', 'ML-32' and 'ML-37' is not the genuine minutes of the meeting.

(7) In view of the above issues the defendant believes that the defendant has merits in the defence and managed to explain the delay caused in filing of this application. Therefore the defendant prays for order in terms of encl 72.

Mr CS Mong for the plaintiff

(1) The judgment and order given on 17 June 2005 had already been sealed and perfected. Under the circumstances this honourable court is functus officio. See *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321; [2003] 3 CLJ 532 at p 533 held:

> [1] Unless a judgment or an order of the court is obtained by default or in the absence of a party, or is otherwise 'tainted by fraud or some other vitiating element', the court has no power under any application in the same action to alter or vary it or set it aside. The 'vitiating element' must be one that contravenes a 'substantive statutory prohibition' and not merely an irregularity amounting to a breach of a rule of court or of practice. In the present case, the impugned order for sale was not one that was obtained ex parte or in default of the defendant's appearance; it was made inter partes. Hence, the High Court would, in the circumstances, have no power to set aside the order for sale as prayed for by the defendant. (*Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 (FC); *Hock Hua Bank v Sahari Murid* [1981] MLJ 143 (FC) followed.) (pp 537g & 538a–h).

(2) On the 17 June 2005 counsel appointed by the defendant appeared in court and hence the judgment was not obtained ex parte. What the defendant should have done is to appeal against the decision. The defendant failing to appeal has no right to apply to set aside the judgment.

(3) This application was filed on 22 October 2006 approximately one year and four months after the judgment was entered. The defendant should have appointed a lawyer immediately to assist her but this was not done.

(4) As a matter of fact the defendant in a separate proceeding in the Shah Alam High Court has appointed a firm of solicitors to represent her in

her bankruptcy suit. There is no reason why she could not have done so in this case.

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(5) The judgment on the 17 June 2005 was entered for two reasons — firstly counsel for the defendant did not have the sanction of the official assignee to represent the defendant in this matter although a previous sanction was given to appoint the previous solicitor. Secondly direction given in the previous case management was not complied with by the defendant. The case management was the 26th case management conducted by Justice Zainun. The plaintiff had been very cooperative towards the defendant solicitor. There is no reason for them not to comply with the case management.

(6) This action was commenced by the plaintiff in 1998 and even up to the date of the judgment, eight years after that matters had not been set up for trial and the court's record would show that the delay was substantially due to the inaction of the defendant. See *Mayban Securities Sdn Bhd v Poh Gaik Lye* [2007] 5 CLJ 555 at p 563:

> It is clear to me that the defendant was disinterested to have the claim against her decided on the merit in a court of law.
>
> It is clear from the undisputed chronology of events set forth in the affidavit of plaintiff that the defendant had embarked on a course of events to delay the progress of the case and to prevent the plaintiff from seeking an early hearing of its claim against her.
>
> A litigant desiring to defend his case in court must assiduously comply with the rules of court so that the dispute can be litigated. Order 34 of the Rules of the High Court 1980 provides for case management procedure to bring about an expeditious hearing of a suit. A party who obstructs the process as the defendant had in my view did in this case will have to suffer the consequence of having judgment entered against him under O 34 r 3 and r 7 of the RHC. The fact that the case involved a large claim had not been heard on the merit does not provide a good ground to set aside a judgment entered on account of her failure to comply with the requirement of O 35 if the fact clearly indicates that she was impeding the very system designed to facilitate the disposal of the suit in which she is a defendant.

As in the Mayban case, the judgment in the present case was entered against the defendant based on O 34 r 7 of the Rules of the High Court 1980 which read as follows

> If any party to an action fails to comply with any direction given by the Judge at any pre-trial conference, such order may be made against the defaulting party by the Judge as meets the ends of justice.

(7) In the event that encl 72 is allowed it will prejudice the plaintiff which cannot be compensated with costs because plaintiff's main witness Zainuddin Mohd Zain has passed away. He was the managing director of the plaintiff who managed the company and

knew about the transaction between the plaintiff and the defendant with respect to the sale of the shares. A

Reply by Puan Maznah Kamaruddin: (Verbatim)

(1) Functus officio — the defendant said that it is a default judgment and the defendant has the right to set aside the judgment. See *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445 at held: B

> (1) In an inter partes application, where the defendant is absent though he has been duly served, the court may proceed to hear the matter and while the application so heard is not an ex parte application, the hearing in the absence of the defendant is an ex parte hearing and the order made on such a hearing is an ex parte order. Therefore, the order made on 13 April 1988 was an ex parte order made in chambers, and the court has jurisdiction provided by O 32 r 6 to have it set aside. C D

(2) The delay is one year four months only from the date of the judgment entered. See *Leong Han v Kupusamy* [1959] MLJ 95 at p 96 (quoting from Lord Atkin in *Evans v Bartlam* [1937] AC 473 at p 480): E

> The courts, however, have laid down for themselves rules to guide them In the normal exercise of their discretion. One Is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure. See *Ng Fook Hiong v Arunachalam Chettiar* [1967] 1 MLJ 25 at held: F G H

> > The learned president should have considered whether the appellant in her application had disclosed a defence on the merits and as it was clear from her affidavit that she claimed to be a subtenant of the premises, the default judgment must be set aside. I

(3) Encik Zainuddin Mohd Zain already affirmed few affidavits and he is not the only director who managed the company because for this particular application there is another person by the name of Encik Mohammad Rosly bin Md Selamat who also claimed has full knowledge of this case and records. I cannot see any prejudice will affect the plaintiff as Encik Zainuddin's affidavits can be used.

FINDINGS AND DECISION

[3] It would appear from the judgment of Zainun Ali J (as she then was) that the judgment was entered against the defendant for two reasons:

(i) the defendant's failure to obtain the sanction from the official assignee to appoint the new counsel to defend the defendant;

(ii) the defendant's failure to comply with the case management direction under O 34 of the Rules of the High Court 1980.

[4] The first reason may be a matter of contention as to whether a new sanction is required from the official assignee under s 38(1)(a) of the Bankruptcy Act 1967 to appoint a new counsel given that the sanction envisaged in this subsection is a 'to maintain any action' and logically therefore the appointment of a new counsel to replace the former should not be required. But it is not the function of this court to enquire into the propriety of the judgment. It is for the defendant to appeal.

[5] The second reason relates to the exercise of the judge's discretion under O 34 r 7 whether to strike out the amended defence by reason of non-compliance of her direction in case management under O 34 r 4. Again this is a matter of the exercise of her discretion to strike out the defendant's defence. Whether or not that discretion was rightfully exercised is not for this court to decide and reverse. It should be rightfully taken on appeal.

[6] The application is dismissed with costs.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed